

No. 5097.

IN THE
United States
Circuit Court of Appeals,
FOR THE NINTH CIRCUIT.

Elizabeth B. Russell, Bankrupt,
Petitioner,

vs.

Hubert F. Laugharn, as Trustee in
Banruptcy of the Estate of Eliza-
beth B. Russell, Bankrupt,
Respondent.

BRIEF OF PLAINTIFF IN ERROR.

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STATEMENT OF FACTS.

Elizabeth B. Russell, who is the bankrupt herein, on September 22, 1923, entered into an agreement in writing for the purchase under contract of the real property involved herein from the Hogan Company, as contract sellers. On that date \$2,000.00 was paid out of her separate funds, and a day or so later \$1,000.00 additional money borrowed from a friend, a Mrs. Hartman, without security, was also paid, making up the total initial payment of \$3,000.00, provided for under the terms of

the contract. Thereupon a contract was delivered to her, and she entered into the possession of the property with her husband and daughter at that time.

Thereafter, on the 11th day of October, 1923, Mrs. Russell filed the Declaration of Homestead upon the property as the wife of the head of the family. This homestead is conceded to be regular in all respects. No additional payments were made upon the purchase price of the property until in February, 1924, when an additional payment was made derived from funds of the Crown Hotel. This hotel was an enterprise which had been for some years past and was being operated by Mr. and Mrs. Russell in a down town section of Pasadena, and was concededly a community enterprise. Mrs. Russell, having the problem of making additional payments upon the property she had purchased, used her agency authority on the Crown Hotel bank account, and from time to time prior to her bankruptcy, which occurred in June, 1926, made additional payments on this purchase contract out of Crown Hotel funds, aggregating \$4,500.00. The agreed total purchase price of the homestead property was \$14,500.00, and at the time of the bankruptcy a total not to exceed \$2,000.00, or at the utmost \$3,000.00, had been paid from her separate funds, and \$4,500.00 from funds withdrawn from community funds. It will be noted that at the time of the Declaration of Homestead on October 11, 1923, no community funds had been involved in the homestead property, excepting perhaps the \$1,000.00 borrowed by her without security. There was no intention or act between Mr. and Mrs. Russell amounting to a gift of the Crown Hotel funds to Mrs. Russell, nor any act or intent to make a loan from the community

to Mrs. Russell. The bankrupt's debts were all contracted since her marriage. They had been married twenty-seven years.

In the course of the bankruptcy proceedings an appraisal was filed showing the homestead property to be of the value of \$14,500.00 altogether, being the identical value at which it had been agreed to be purchased. Thus there had been no increase of the value of Mrs. Russell's investment therein since filing the declaration. In the course of the bankruptcy proceedings, the trustee set aside the exempt property by his report of exemptions, but in said report refused to set aside the homestead property as exempt, and recommended that an order be made by the Referee permitting the property to be sold free and clear of liens, and the Referee thereupon, after due hearing, confirmed the report of the said Referee and ordered that the homestead property be sold, and the sum of merely \$5,000.00, statutory homestead exemption, set aside (which must be pro-rated between Mr. and Mrs. Russell as best they could), and all the balance of the proceeds devoted to the payment of the Hogan Company's balance of sale price, and the residue paid to the estate in bankruptcy. A petition for writ of review was granted by the Referee, and the question presented to the United States District Court, of the Southern District of California.

The question presented is this:

“Do community funds under the control of the husband in California lose their character as such, and become identified with the wife's separate property by the mere application of said community funds towards part payment of the homestead property,

where the Declaration of Homestead was filed at a prior date, without any feature of gift from the husband to the wife, or of loan of the funds from the husband to the wife, but where the application is merely made by the wife by virtue of an agency enjoyed by her in the community bank account.”

Specification of errors relied on is involved in the order of the United States District Court confirming the Referee’s Order involving the following points of error, to-wit:

1. Refusing to set aside as exempt the homestead property of the bankrupt described as follows:

“Property lying and being in the county of Los Angeles, state of California, and bounded and particularly described as follows:

That portion of lot 2 in block ‘Q’ of the San Pasqual Tract, book 3, page 315, miscellaneous records of said county, described as follows:

Beginning at a point in the east line of Hudson avenue, distant 70 feet south from the southeast corner of California street and Hudson avenue, as said corner is shown on the map of the Oakwood Tract, recorded in book 9, page 33 of maps, thence east parallel with the south line of California street, one hundred twenty-five (125) feet, thence south parallel with the east line of Hudson avenue 60 feet, thence west parallel with the south line of said California street, 125 feet to the east line of Hudson avenue, thence north along said east line 60 feet to the point of beginning. Also known as 590 S. Hudson avenue, in the city of Pasadena, California.”

2. Ordering the trustee in bankruptcy to bring proceedings to sell the homestead, being exempt property, though of a value less than \$5000.00, the amount of the exemption, and to account to the estate in bankruptcy for

all proceeds in excess of the encumbrances with interest and the \$5000.00 exemption, thus converting the community property to the use of the wife's estate in bankruptcy.

3. Pooling the \$5000.00 exemption over both the separate estate of the bankrupt wife and also the community interest of the husband, in the homesteaded property, though the community interest was added to the investment after the declaration of homestead, and ignoring the fact of the community (husband's) undivided interest in the property as distinct from the wife.

4. Denying the bankrupt a full exemption of \$5000.00 in the homestead property belonging to her of value as established by the record not in excess of \$5000.00.

5. Converting the community property of the husband into the separate property of the wife without gift, descent, devise or loan from husband to the wife.

6. Subjecting community property of the husband to the debts of the wife without the appropriation thereto by the husband.

7. Altering the estate in the property as between the wife's separate interest and the community as tenant in common into the separate property of the wife.

The order of the referee confirming the report of the trustee in bankruptcy refusing to set aside the exempt homestead and ordering a sale thereof, of the homestead interest of the wife, being of a value less than \$5000.00, was excepted to by the bankrupt, who filed on November 26, 1926, her petition for writ of review of said referee's order in the United States District Court, which petition was granted, but thereafter in pursuance to the review of

said order the same was on January 29, 1927, confirmed and approved by said United States District Court and an exception thereto allowed.

California State Statutes Referred to.

Sections of Civil Code:

161. A husband and wife may hold property as joint tenants, tenants in common or as community property.

162. All property of the wife * * * acquired after marriage by gift, bequest, devise or descent * * * is her separate property. * * *

164. All other property acquired after marriage by either husband or wife or both * * * is community property. * * *

167. The property of the community is not liable for the contracts of the wife made after marriage. * * *

172. The husband has the management and control of the community personal property. * * *

172a. The husband has the management and control of the community real property but the wife must join in deed. * * *

1240. The homestead is exempt from execution or forced sale.

1243. The homestead can be abandoned only by a declaration. * * *

1254. If * * * the land exceeds in value the amount of the homestead exemption * * * he (the court) must make an order directing the sale. * * *

1256. If the sale is made the proceeds thereof, to the amount of the homestead exemption, must be paid to the claimant. * * *

Section 1474, Code of Civil Procedure, provides in substance that the title to the homestead descends to the heirs and devisees of the owner of the title thereto, underlying the homestead claim, where the homestead was selected on decedent's separate property without consent.

Section 853, Civil Code: Where a transfer of real property is made to one person and the consideration paid by another a trust is presumed to result in favor by or for whom such payment was made.

Points of Argument.

The bankrupt's interest in the property was of value not in excess of \$2000.00 at time of recording declaration of homestead (see STIPULATION AS TO CERTAIN FACTS between attorneys for bankrupt and the trustee printed on pp. 42 and 43 of Petition for Revision), and by this stipulation it appears that all subsequent accretions to the investment were subsequent to the declaration of homestead and from community funds.

Money borrowed by a spouse without security on separate property is community money.

Schuyler v. Broughton, 70 Cal. 282.

There was no increase in the value of the property and hence no excess created over the exemption limit. (Report of Appraisers, Petition p. 41; Referee's Order, Petition p. 30.)

The status of property as to its separate or community character is determined by the mode of acquisition.

Potter v. Smith, 48 Cal. App. 162.

When property is acquired in part by the use of community funds and in part by the use of separate funds the

interests therein will be prorated between the separate and community estates in the proportion of said respective funds.

Schuyler v. Broughton, 70 Cal. 282.

There was no gift and no loan of funds from husband to wife involved in this Russell case. (See Referee's Opinion, Petition printed pp. 31 and 32. Also STIPULATION between trustee and attorneys for bankrupt, pp. 42 and 43 of printed Petition.)

Community funds create a community interest in property so acquired and are held in trust by the spouse so acquiring, for the community.

25 Cal. Juris. 194;

Shanan v. Crampton, 92 Cal. 9;

Osborn v. Mills, 20 Cal. App. 346.

And this last authority is to the effect that taking in the wife's name does not affect this trusteeship for the community.

The mere possession or actual management by one of the spouses does not affect the title of the community nor show an intention of the other spouse to make a gift.

Shaw v. Burnell, 163 Cal. 262;

Varni v. DeVoto, 10 Cal. App. 304.

Husband and wife may have an interest as tenants in common in property of a homestead character.

In re Bailard, 178 Cal. 293.

If the foregoing proposition is sound, much less does a husband forfeit community property to creditors of the wife because of the mere fact that the wife has drawn money out of the community bank account on her agency

signature and made payments on property of hers already homesteaded.

The declaration of homestead does not affect the real or underlying title to the property itself as it stood before the declaration but merely, while it continues unabandoned, gives the property certain characteristics or incidents—principally two—inviolability to creditors' claims and succession to survivor under certain conditions on the death of one spouse.

Burkett v. Burkett, 78 Cal. 310;
Sec. 1474, Code of Civil Procedure.

If a homestead was synonymous with title then why should the court distribute a homestead out of separate property of decedent under certain circumstances still to the heirs and devisees of the decedent subject only to a limited use to the survivor unless the underlying title was still in the decedent, and if a homestead is abandoned by declaration it resumes its former ownership as to title free of restriction.

The foregoing considerations are urged for the particular purpose of making the point that by the two sources of investment the Russell homestead property as to title was tenancy in common and is still and would have been even though the declaration had followed the completion of all investments therein—that the title which the trustee proposed to sell and divest is the undivided property of both spouses, and the husband regardless of a forced sale in the bankruptcy proceedings will retain his undivided interest in the proceeds prorata and that his prorata of the equity in the property over the amount still due the contract seller will reduce the proceeds remaining to the bankrupt to

\$2000.00—that nothing can go to the creditors in such a proceeding by any possibility, and the sale is therefore entirely improper and the order of the referee requiring the sale should be reversed and the order of the referee on confirmation of trustee's report of exempt property should be modified to require the trustee to set apart the entire real property described in the homestead as exempt property and to remove it from the effect of the bankruptcy proceedings.

Respectfully submitted,
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